

SUPERIOR COURT OF ARIZONA
MARICOPA COUNTY

LC2011-000583-001 DT

01/09/2012

THE HON. CRANE MCCLENNEN

CLERK OF THE COURT
K. Waldner
Deputy

STATE OF ARIZONA

JOHN TUTELMAN

v.

SUZANNE LENISA SALMAN (001)

SUZANNE LENISA SALMAN
7601 N 31ST AVE
PHOENIX AZ 85051

PHX MUNICIPAL CT
REMAND DESK-LCA-CCC

RECORD APPEAL RULING / REMAND

Lower Court Case Number 2011-9001602.

Defendant-Appellant Suzanne Lenisa Salman (Defendant) was convicted in Phoenix Municipal Court of three counts of displaying a sign without a sign permit. Defendant contends the applicable city code provisions (1) violate her First Amendment rights, (2) violate her rights under A.R.S. § 41-1493.01, and (3) violate her equal protection rights under the Fourteenth Amendment. For the following reasons, this Court affirms the judgment and sentence imposed.

I. FACTUAL BACKGROUND.

On January 21, 2011, Defendant was cited for three counts of displaying a sign without a valid sign permit in violation of Phoenix City Code Ch. 41, §§ 705(B)(1) and 1004, alleged to have occurred on November 8, 2010; November 22, 2010; and January 19, 2011. Prior to trial, Defendant filed a Motion To Dismiss that alleged (1) the object in question was not a sign as defined by the Phoenix City Code, (2) city code provision violated her First Amendment rights, and (3) the City of Phoenix may not regulate objects such as the one in question.

At the trial, Frank Danci testified he was the site development supervisor for the Planning and Development Department of the City of Phoenix. (R.T. of May 10, 2011, at 12.) He testified about the ownership and the zoning of the property in question. (*Id.* at 13-14.) Theresa Hillner was a planner with the Planning and Development Department of the City of Phoenix, and testified the City never issued a sign permit for the property in question. (*Id.* at 21.) She further testified the object in question met the definition of a “sign” under the Phoenix City Code. (*Id.* at 22-23.) Martin Nordby was an Administrative Assistant in the Charging Bureau of City of Phoenix

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Prosecutor's Office, and testified the sign was in violation of the City of Phoenix zoning ordinance. (*Id.* at 34–39.) Frank Wolf was a survey crew chief for the City of Phoenix, and testified part of the sign was within the City of Phoenix right-of-way. (*Id.* at 48–50, 52.) Michael Miller was a survey engineer with the City of Phoenix, and testified about the words appearing on the sign. (*Id.* at 59–61.) Wade Bonine lived directly north of the property in question, and also testified about the words appearing on the sign. (*Id.* at 63–64.)

At the conclusion of the above testimony, the State rested. (R.T. of May 10, 2011, at 71.) Defendant then argued her motion to dismiss. (*Id.* at 71–78.) After hearing the State's response and Defendant's reply, the trial court denied Defendant's motion to dismiss. (*Id.* at 85.) The trial court then took the matter under advisement. (*Id.* at 88.)

The trial court subsequently made the following findings. It found the object in question was in fact a sign pursuant to the Phoenix City Code. (R.T. of May 12, 2011, at 89.) It found Defendant's sign did not qualify under any of the exceptions, and thus required a permit from the City of Phoenix. (*Id.* at 90–91.) It found Defendant's sign was not protected under Arizona's Free Exercise of Religion Act. (*Id.* at 92.) Finally, it found requiring a permit did not violate any of Defendant's Constitutional rights. (*Id.* at 92.) The trial court thus found Defendant guilty of all three counts. (*Id.* at 93.) The trial court then placed Defendant on summary probation. (*Id.* at 97.) On May 25, 2011, Defendant filed a timely notice of appeal. This Court has jurisdiction pursuant to ARIZONA CONSTITUTION Art. 6, § 16, and A.R.S. § 12–124(A).

II. ISSUES.

A. Does requiring a sign permit violate Defendant's First Amendment rights.

Defendant contends requiring her to obtain a sign permit violates her First Amendment rights. The United States Supreme Court has said the following:

While signs are a form of expression protected by the Free Speech Clause, they pose distinctive problems that are subject to municipalities' police powers. Unlike oral speech, signs take up space and may obstruct views, distract motorists, displace alternative uses for land, and pose other problems that legitimately call for regulation. It is common ground that governments may regulate the physical characteristics of signs

City of Ladue v. Gilleo, 512 U.S. 43, 48 (1994). In *Reed v. Town of Gilbert*, 587 F.3d 966 (9th Cir. 2009), the court held a sign regulation is permissible as long as it is content-neutral and does not favor commercial speech over non-commercial speech, even though it may affect a religious message. 587 F.3d at 893. In the present case, the evidence presented was the code provisions in question applied to all signs in a residential area, regardless of content, regulated both commercial and non-commercial signs, and regulated the physical characteristics of the sign. The trial court thus correctly concluded requiring Defendant to obtain a sign permit did not violate her First Amendment rights.

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B. Is Defendant's sign protected by Arizona's Free Exercise of Religion Act.

Defendant contends requiring her to obtain a sign permit violates Arizona's Free Exercise of Religion Act, A.R.S. § 41-1493.01. A party who raises a religious exercise claim or defense under Arizona's Free Exercise of Religion Act must establish three elements: (1) The person's action was motivated by a religious belief; (2) the person sincerely held the religious belief; and (3) the governmental action substantially burdened the exercise of religious beliefs. *State v. Hardesty*, 222 Ariz. 363, 214 P.3d 1004, ¶¶ 10-11 (2009). In the present case, although Defendant made numerous arguments to the trial court about the sign, Defendant never testified about her motives in posting the sign or about her religious beliefs. Arguments of counsel are not considered evidence. *State v. Grounds*, 128 Ariz. 14, 15, 623 P.2d 803, 804 (Ct. App. 1981). There was thus no evidence before the trial court showing what Defendant's motivation was in posting the sign or what her religious beliefs were, so Defendant failed to establish the first and second prong of the test under *Hardesty*. Further, the evidence presented was Defendant would be able to have a sign as long as it conformed to the size limits that applied to all signs in a residential neighborhood, and Defendant would be permitted to say what she wanted on that sign. Thus, the trial court correctly found the City's permitting requirement did not substantially burden the exercise of Defendant's religious beliefs.

C. Does requiring a sign permit violate Defendant's Fourteenth Amendment rights.

Defendant contends requiring her to obtain a sign permit violates her Fourteenth Amendment rights. Defendant appears to be making an equal protection claim based on her contention that the City does not require owners of other types of signs to obtain permits. The evidence presented, however, was the City required permits for all residential signs, commercial as well as non-commercial. Defendant had thus failed to present evidence showing a denial of equal protection.

Defendant further contends she was denied equal protection because the City Code allows political signs to be larger than the type of sign she would be allowed to have. The Equal Protection Clause does not apply if the persons are not similarly situated. *State v. White*, 194 Ariz. 344, 982 P.2d 819, ¶¶ 38-39 (1999) (although defendant and his codefendant were both involved in victim's killing, defendant was the one who shot victim, thus defendant and codefendant were not similarly situated, so death sentence for defendant and life sentence for codefendant did not violate equal protection). The evidence presented was political signs were only allowed for a certain period before an election and had to be removed within a certain time after the election. Defendant's sign, on the other hand, was a permanent sign. Thus, Defendant was not similarly situated with a political candidate, so it was permissible to have different regulations apply to those different situations.

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D. *Did the information sheet prepared by city employees grant Defendant any special rights.*

Defendant contends she should have been able to post her sign without a sign permit based on what was said in an information sheet prepared by city employees. It is the purview of City Council of the City of Phoenix to enact laws and code provisions, so what is controlling in the present case are the Phoenix City Code provisions and not on what was said in some information sheet prepared by some unknown employee of the City of Phoenix. Thus, the trial court was not permitted to base its decision on the information sheet presented by Defendant.

III. CONCLUSION.

Based on the foregoing, this Court concludes the trial court correctly found Defendant was required to obtain a permit for the sign she wished to post, and that the size regulation for such a sign did not violate any of Defendant's rights.

IT IS THEREFORE ORDERED affirming the judgment and sentence of the Phoenix Municipal Court.

IT IS FURTHER ORDERED remanding this matter to the Phoenix Municipal Court for all further appropriate proceedings.

IT IS FURTHER ORDERED signing this minute entry as a formal Order of the Court.

/s/ Crane McClennen
THE HON. CRANE MCCLENNEN
JUDGE OF THE SUPERIOR COURT

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